STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

MARLON BELL,

Defendant-Appellee.
_____/

Supreme Court No. 125375

Court of Appeals No. 233234

Lower Court No. 99-9228-03

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellant

DOUGLAS W. BAKER (P49453)
Attorney for Defendant-Appellee

APPELLEE'S BRIEF ON APPEAL

STATE APPELLATE DEFENDER OFFICE

BY: **DOUGLAS W. BAKER ((P49453))**
Assistant Defender
State Appellate Defender Office
Suite 3300 Penobscot
645 Griswold
Detroit, MI 48226

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES, COURT RULES

STATEMENT OF QUESTIONS PRESENTED

I. MUST THE ERRONEOUS DENIAL OF A PEREMPTORY CHALLENGE RESULT IN A NEW TRIAL WHERE THE OBJECTED-TO JURORS SAT ON THE JURY THAT CONVICTED THE DEFENDANT?

COUNTER-STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

Defendant-appellant Marlon Bell stood trial with two codefendants, Matthew Bell and Troy King, on two counts each of premeditated murder,[1] felony murder,[2] armed robbery,[3] conspiracy[4] to commit murder, and conspiracy to commit armed robbery. The trial took place in Wayne County Circuit Court, with Judge Leonard Townsend presiding, and each defendant's case was decided by a separate jury. After Judge Townsend dismissed the premeditated murder and conspiracy to commit murder charges against Marlon Bell, Marlon Bell's jury found him guilty of the remaining charges. Judge Townsend later sentenced him on the felony murder convictions to concurrent terms of the mandatory sentence of life imprisonment without the possibility of parole, and on the conspiracy and robbery convictions to concurrent terms of life imprisonment.

Marlon Bell appealed by right. On reconsideration, the Court of Appeals reversed and remanded for retrial. The prosecution sought, and this Court granted, leave to appeal.

The single issue before this Court

Without deciding the six other issues raised, the Court of Appeals reversed because Judge Townsend arbitrarily denied Mr. Bell his statutory right to use peremptory challenges against two prospective jurors. However, two concurring judges invited this

---

[1] MCL 750.316(1)(a).

[2] MCL 750.316(1)(b).

[3] MCL 750.529.

[4] MCL 750.157a.

Court to reconsider its long-held view that errors in the jury-selection process are not subject to harmless-error analysis.

The prosecution concedes that Judge Townsend erred. Thus, the only issue for this Court's consideration is whether the error warrants reversal.

Additional facts pertinent to the issue before the Court

The defense accepts the factual assertions contained in the prosecution's statement of facts. It adds the following:

During jury selection, Judge Townsend asked whether any of the potential jurors were "in law enforcement" or had relatives who were. 51a. Juror No. 10, Michael Anderson (28a), answered that "I have three friends that are police officers. . . . Good acquaintances. . . . One's a chief, and two of them are, like second or third in command." 52a-53a.

Judge Townsend asked, "And does that make any difference to you?" Mr. Anderson answered, "I wouldn't think so." 53a.

Judge Townsend asked, "Do you think if you found the defendant guilty you'd have to explain or apologize to your brother [sic?] for that?" Mr. Anderson answered, "I hope not." 53a.

Pressed by the judge to answer whether his friendships "would make a difference," Mr. Anderson answered, "No, I don't think so." 53a.

Pressed further, Mr. Anderson agreed that he could render a not guilty verdict if the prosecution failed to prove its case, and that he would not expect to have to explain such a verdict to his friends. 53a-54a.

Counsel later attempted to use a peremptory challenge to excuse Mr. Anderson. 113a. Although the prosecutor did not object,[5] Judge Leonard Townsend nevertheless refused to discharge the potential juror, saying that counsel had already struck too many white male members of the jury panel.[6] 114a. Judge Townsend accused counsel of using "racism" as his criterion for making strikes:

> "All right. The Court is going to disallow the Defense Attorney from exercising challenges, because the Court has determined, from the challenges for this jury for the better part of all day today, that the defendant is, the Defense Attorney, Mr. Mack, is exercising challenges based on the race of the juror.
>
> Now, this Court knows that a defendant is not entitled to a black jury; he is not entitled to a white jury. The jury is picked on chance.
>
> That the race of a juror cannot be a consideration for exercising a challenge. The same way a prosecutor cannot do it.
>
> And so far the only thing we have had in this case has been that white, male jurors are being excused. And this Court is determined that racism is being used in jury selection.
>
> I will not permit it. I will let that juror sit, and we will now proceed with this trial." 114a.

Judge Townsend did not make a record of the racial identities of the prospective jurors, and the record does not otherwise reveal that information, so it is not possible to determine whether the male panelists defense counsel had excused were white, black, or of some other race. The record does clearly show, however, that not all the prospective jurors defense counsel had stricken were men. Of the seven previous challenges he had

---

[5] After Judge Townsend at his own initiative had already refused to allow counsel's peremptory challenge, the prosecutor commented that she "didn't get a chance to make an objection." 115a.

[6] Marlon Bell is black; Chanel Roberts and Amanda Hodges were white.

made, at least two were of women: Lauren Bellman (28a, 74a), and Gloria Callahan (75a, 77a).

Judge Townsend did not ask counsel his reasons for wanting to strike Mr. Anderson, and in particular did not ask for race-neutral reasons. When counsel did point out, though, that there remained more white than minority panelists, Judge Townsend seized on that comment as support for the notion that counsel's strikes were race-based:

> "MR. MACK: I would bring to the Court's attention that the number of white males on that panel still exceeds the number of the minorities on that panel. Why don't you talk about the whole racial composition of that panel? There's still a vast majority of white members than it is black members on that panel.
>
> I haven't come close to exhausting my client's right to peremptory challenges under the Court rule.
>
> And there was no objection made by the Prosecution in this case.
>
> THE COURT: So, all right. So he has actually supported—you've actually supported what I said. You want more racial members on the panel—
>
> ****
>
> You've already stated you don't like the racial makeup of the jury, and that's why you're doing it. So, we're going to continue." 115a, 116a.

With defense counsel unable to excuse him, Michael Anderson remained on the jury and voted to convict Mr. Bell.

When defense counsel later sought to strike another white male juror, the prosecutor now objected on Batson[7] grounds. 126a. The prospective juror, Jerry Wenzel, had given his own occupation (pipefitter) and his wife's (office assistant), and

[7] Batson v Kentucky, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986) (equal protection guarantee forbids prosecutor from using peremptory challenge to excuse juror solely on basis of race); see also Georgia v McCollum, 505 US 42; 112 S Ct 2348; 120 L Ed 2d 33 (1992) (extending Batson rule to criminal defendants).

had promised to be fair to both sides. 125-26a. Again, without bothering to ask for counsel's reasons for making it, Judge Townsend refused to allow counsel's challenge:

> "THE COURT: All right. The Court will disallow the challenge, for the same reasons as asserted before.
>
> We'll proceed.
>
> MR. MACK: I note for the record—
>
> THE COURT: The Defense Counsel objects. We understand that. But I've already stated why. The challenge is being disallowed. And I believe that applies to this, also, for the same reason.
>
> Okay. Would you other ladies and gentlemen—you may be excused. We have a jury now. We're going to proceed." 127a.

The prosecutor now asked to approach the bench. 127a. Outside the jury's presence (127a), she explained that she had not objected to two challenges counsel made between the two the judge disallowed, even though both were to white men, because she recognized there were reasons for those challenges.[8] 128a. She objected to the latest challenge, though, because she saw no basis for it. 128a. She also reminded the judge that counsel had another peremptory challenge remaining. 128a. Counsel pointed out that the jury as constituted contained at least as many white males as black males, if not more. 128a. Nonetheless, Judge Townsend decided to "stand on the record" (130a), and as a consequence Mr. Wenzel, too, remained on the jury.

[8] One of the challenges was to a police officer; the other, to a man who had once lived on the street where the murders occurred and who at first said he was "not sure" whether that fact would affect his ability to be impartial (122a-123a). 128a.

SUMMARY OF ARGUMENT

Marlon Bell was arbitrarily denied his right to use peremptory challenges to prevent jurors he thought might be biased against him from sitting on his jury. Peremptory challenges exist precisely for the purpose of assuring impartiality by allowing the parties to exclude jurors who might be biased but whose bias cannot be proved. Arbitrarily denying that important right, granted by every state, deprives a defendant of his constitutional rights to due process and to an impartial jury. Such error is structural, and so harm is presumed. Requiring the defendant to prove harm, a practical impossibility, would eviscerate the right to peremptory challenges by rendering it unenforceable. If a harmless-error test is to be used at all in peremptory-challenge cases, it should be confined to those that do not involve, as this one does, the outright denial of a challenge that results in the juror the defendant suspects of bias sitting on the jury that decides his fate. Finally, the prosecution is simply wrong in asserting that the record shows that race or gender discrimination was the reason for counsel's unsuccessful peremptory challenges. The obvious inference to be drawn from the record is that counsel was pointing to the racial makeup of the jury and jury panel in answer to the Batson stage-one inquiry, which asks whether there is a prima facie showing of discrimination.

I. THE ERRONEOUS DENIAL OF A PEREMPTORY CHALLENGE CANNOT BE HARMLESS WHEN THE OBJECTED-TO JURORS SIT ON THE JURY THAT CONVICTS THE DEFENDANT.

The trial judge summarily issued two "reverse Batson"[9] rulings that prevented Marlon Bell from exercising his statutory right to peremptorily excuse two white male jurors, one of whom was a friend of three high-ranking police officers and offered only that he "wouldn't think" those friendships would influence his consideration of the evidence. 52a-53a. The Court of Appeals reversed. Two judges concurred on constraint of People v Miller,[10] which fashioned an automatic-reversal rule for jury-selection errors because such errors are essentially impervious to harmless-error analysis. The concurring judges urged this Court to reconsider Miller. The prosecution, which had not previously advocated for a harmless-error rule, now asks this Court to accept the concurrence's invitation.

The defense asks the Court to recognize that, though some jury selection errors might be too trivial to warrant reversal, the error in question here—an arbitrary denial of the right to peremptory challenges that leads directly to the challenged jurors sitting on the jury that convicts the defendant—is not.

---

[9] Batson v Kentucky, 476 US 79, 106 S Ct 1712, 90 L Ed 2d 69 (1986), held that a prosecutor may not peremptorily excuse a prospective juror simply because of that juror's race. Georgia v McCollum, 505 US 42, 112 S Ct 2348, 120 L Ed 2d 33 (1992), extended the rule to defense attorneys. The accusation that a defense attorney has violated the rule of Batson and McCollum is sometimes referred to as a "reverse Batson" claim.

[10] 411 Mich 321, 326 (1981).

A. **A TRIAL COURT'S ARBITRARY REFUSAL TO ALLOW A DEFENDANT TO PEREMPTORILY EXCUSE A PARTICULAR JUROR VIOLATES THE DEFENDANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS[11] AND AN IMPARTIAL JURY.[12]**

The concurrence's invitation to reconsider Miller rests on the mistaken premise that the error involved here is nonconstitutional.[13] A trial court's arbitrary denial of peremptory challenges on spurious reverse-Batson grounds violates the federal constitution. True, the right to peremptory challenges is one granted by state statute[14] and court rule[15]; there is no constitutional right to peremptory challenges.[16] "Nonetheless, the [peremptory] challenge is 'one of the most important rights secured to the accused.'"[17] Writing for the Court in Holland v Illinois,[18] Justice Scalia outlined the history of peremptory challenges and emphasized their importance as a means of protecting the right to an impartial jury:

---

[11] US Const, Am XIV.

[12] US Const, Am VI.

[13] The concurrence views Miller as inconsistent with this Court's more recently expressed view that preserved nonconstitutional errors should normally be subject to a more-likely-than-not-outcome-determinative harmless-error test. See People v Lukity, 460 Mich 484, 495-96 (1999).

[14] MCL 768.12 & 768.13.

[15] MCR 6.412 (E).

[16] Ross v Oklahoma, 487 US 81, 88; 108 S Ct 2273; 101 L Ed 2d 80 (1988).

[17] Swain v Alabama, 380 US 202, 219; 85 S Ct 824; 13 L Ed 2d 759 (1965) (quoting Pointer v United States, 151 US 396, 408; 14 S Ct 410; 38 L Ed 208 (1894)).

[18] 493 US 474, 481-82; 110 S Ct 803; 107 L Ed 2d 905 (1990) (bold emphasis added; italicized emphasis in the original).

> "The tradition of peremptory challenges for both the prosecution and the accused was already venerable at the time of Blackstone, see 4 W. Blackstone, Commentaries 346-348 (1769), was reflected in a federal statute enacted by the same Congress that proposed the Bill of Rights, see Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat. 112, 119, was recognized in an opinion by Justice Story to be part of the common law of the United States, see United States v Marchant, 12 Wheat. 480, 483-484, 6 L.Ed. 700 (1827), and has endured through two centuries in all the States, see Swain, supra, 380 U.S., at 215-217. **The constitutional phrase "impartial jury" must surely take its content from this unbroken tradition. One could plausibly argue, though we have said the contrary,** see Stilson v United States, 250 U.S. 583, 586, 40 S.Ct. 28, 29-30, 63 L.Ed. 1154 (1919)) **that the requirement of an "impartial jury" impliedly *compels* peremptory challenges . . . ."**

The system of peremptory challenges has traditionally provided the "assurance of impartiality" by "'eliminat[ing] extremes of partiality on both sides,' [Swain, 380 U.S. at 219], thereby 'assuring the selection of a qualified *and unbiased* jury,' Batson, supra, 476 U.S., at 91.[19]

Because the right is so important, its arbitrary and outright denial offends due process. The arbitrary denial of any state-created life, liberty, or property interest violates due process.[20] "The state right to peremptory challenges is a state-created liberty interest protected by the Fourteenth Amendment to the Constitution."[21] Both federal and state courts have held that a trial court's denial of peremptory challenges on reverse-Batson

---

[19] Holland, 493 US at 483-84 (emphasis added by Holland).

[20] Hicks v Oklahoma, 447 US 343, 346; 100 S Ct 2227; 65 L Ed 2d 175 (1980); US Const, Am XIV.

[21] Vansickel v White, 166 F3d 953, 957 (CA 9, 1999). The Michigan rule and statute conferring a right to peremptory challenges use the same mandatory language as the California rule at issue in Vansickel. Compare Cal Civ Proc § 231 ("shall be entitled to") with MCR 6.412(E) ("is entitled to") and MCL 768.13 ("shall be allowed to").

grounds without following proper Batson procedures is an arbitrary denial of the state-created interest in peremptory challenges, and so violates due process.[22]

The federal circuit courts are undivided in this view. Because this Court defers to the unconflicted view of the federal circuits on matters of federal law,[23] that is reason alone to conclude that the error here was constitutional.

Neither the prosecution nor the concurrence points to any counter-authority. Instead, the concurrence reasons in the abstract that the error cannot violate due process because Michigan law conditions the right to peremptory challenges on its general statutory provision that, to merit reversal, errors of pleading or procedure must cause manifest injustice.[24] Because this Court has equated "manifest injustice" with a more-likely-than-not-outcome-determinative harmless-error standard,[25] the concurrence

---

[22] See Aki-Khaum v Davis, 339 F3d 521, 528 (CA 7, 2003) (affirming grant of writ of habeas corpus) (trial judge erred by invoking Batson procedures in absence of prima facie evidence of discrimination, step one of the process, then collapsing second and third steps and improperly placing burden of persuasion on defendant; held, "trial court's misapplication of Batson violated [petitioner's] Fourteenth Amendment due process and equal protection rights"); United States v McFerron, 163 F3d 952, 955 (CA 6, 1998) (after government satisfied Batson step one, trial judge erred by collapsing steps two and three and placing burden of persuasion on defendant; held, structural error requiring reversal); Stewart v State, 662 So 2d 552, 557 (Miss, 1996) (trial judge invoked Batson procedures in absence of prima-facie evidence of discrimination and collapsed steps two and three; held, due process violation requiring reversal).

[23] Schueler v Weintrob, 360 Mich 621, 633-34 (1960); accord People v Stevens, 460 Mich 626, 642 n 6 (1999).

[24] MCL 769.26.

[25] Lukity, 460 Mich at 495.

concludes that no defendant may complain that denial of a state-law procedural right denied him due process unless he can meet the outcome-determination standard.[26]

That line of reasoning confuses rights and remedies. The question whether Marlon Bell's state-created right to peremptory challenges was arbitrarily withheld is answered by examining the trial court's behavior, not state-law rules for securing retrial. Perhaps the best refutation of the concurrence's reasoning lies in the due-process decisions themselves. If, as the concurrence supposes, a state's harmless-error rules are part of the underlying state-created right, then the due-process decisions would necessarily consider whether state harmless-error standards were satisfied before finding a due-process violation. They do not. Indeed, the United States Supreme Court has considered a similar argument and rejected it. In Hicks v Oklahoma,[27] the petitioner had not been afforded his state-created right to jury sentencing. The state appellate court recognized the error, but ruled it harmless because the sentence imposed was one the jury might have chosen had it been given the choice. In the United States Supreme Court the state further argued that the petitioner had received all state law promised him (and thus that no due process violation had occurred) because the state-law right to jury sentencing was conditional: the state appellate court had the power to modify a jury's sentence as it saw fit. The Court rejected both arguments, and held that by denying the petitioner his

---

[26] A defendant is not denied due process of law if he has received all state law allows him. Ross, 487 US at 90-91. Thus, he is not denied due process when "forced" to use a peremptory challenge to excuse a prospective juror who should have been excused for cause, even though as a consequence his state-law-allotted peremptory challenges are diminished in number by one. Correcting mistaken challenge-for-cause rulings is one of the functions of the peremptory challenge. A defendant who uses a challenge for that reason has not been denied any right conferred by state law. See United States v Martinez-Salazar, 528 US 304; 120 S Ct 774; 145 L Ed 2d 792 (2000) (decided in context of federal rule-based right); Ross, supra.

[27] 447 US 343; 100 S Ct 2227; 65 L Ed 2d 175 (1980).

state-created right to a jury sentence *in the first instance* the state denied him due process, no matter the limitations state law placed on the petitioner's later ability to protect his right in the state appellate courts.[28]

The error here was constitutional.

B. A COURT'S ARBITRARY DENIAL OF THE RIGHT TO PEREMPTORILY CHALLENGE A PARTICULAR JUROR IS "STRUCTURAL," NOT "TRIAL" ERROR.

The overwhelming weight of authority supports the view that erroneous denial of the right to peremptorily challenge a particular juror is structural, not trial, error.[29] Arizona v Fulminante,[30] cited by the concurrence, supports rather than contradicts that view. Fulminante identified two forms of constitutional error: structural, and trial. Trial error is "error that occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of the other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt."[31]

---

[28] Hicks, 447 US at 345-47. Also instructive is Vansickel, 166 F3d at 955-57. Vansickel did not receive ten of the twenty peremptory challenges allowed him by California rule. He did not contemporaneously object, and therefore under California law was required to prove prejudice on appeal. Id. at 955. Even so, the denial of his right to peremptory challenges violated due process. Id. at 956-57.

[29] In addition to the cases cited above, see, e.g., United States v McFerron, 163 F3d 952, 956 (CA 6, 1998) (holding erroneous reverse-Batson ruling structural error without reaching constitutional issue); Annigoni v United States, 96 F3d 1132, 1143-46 (CA 9, 1996) (en banc) (same); United States v Broussard, 987 F2d 215 221 (CA 5, 1993) (same), abrogated on other grds J.E.B. v Alabama, 511 US 127; 114 S Ct 1419; 128 L Ed 2d 89 (1994); State v Vreen, 143 Wash 2d 923, 930-31; 26 P3d 236, 239 (2001) (en banc). But see Aki-Khaum, 339 F3d at 529, n 6 (due process violation of misapplying Batson to bar peremptory challenges held not harmless); Lyons v United States, 683 A2d 1066, 1971 (DC 1996) (denial of statutory right to peremptory challenges not structural error; due-process issue not considered).

[30] 499 US 307; 111 S Ct 1246; 113 L Ed 2d 302 (1991).

[31] Fulminante, 499 US at 307-08.

Structural errors, by contrast, are "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless error' standards."[32] A structural error affects "the framework within which the trial proceeds, rather than simply [being] an error in the trial process itself."[33]

A trial court's erroneous refusal to allow a defendant to use peremptory challenges as he sees fit is clearly not a "trial error" within the meaning of Fulminante. It does not occur during "the presentation of the case to the jury," and is not evidentiary in nature.

Such an error is clearly structural. It implicates the trial "mechanism," or "framework." As a non-evidentiary error, it defies analysis by harmless error standards, because it cannot be "quantitatively assessed in the context of the other evidence presented."[34]

---

[32] Id. at 309.

[33] Id. at 310.

[34] The concurrence emphasizes that structural error has been found in a "limited number of cases," and it is true that the list provided in Fulminante is short. Fulminante, 499 US at 310. However, that Fulminante's list of structural-error cases is not exhaustive is demonstrated by jury-selection cases not mentioned but applying a rule of automatic reversal: Batson, supra (race discrimination in jury selection), and Davis v Georgia, 429 US 122; 97 S Ct 399; 50 L Ed 2d 339 (1976) ("Witherspoon error" in jury selection). Moreover, within a week after issuing Fulminante the Court decided Powers v Ohio, 499 US 400; 111 S Ct 1364; 113 L Ed 2d 411 (1991), in which it reversed without harmless error analysis because the petitioner had been denied the opportunity to make a Batson challenge.

C. APPLYING A HARMLESS ERROR RULE—IN EFFECT, AN AUTOMATIC AFFIRMANCE RULE—WOULD RENDER THE RIGHT TO PEREMPTORY CHALLENGES UNENFORCEABLE.

Questions of constitutional and structural error aside, applying Lukity's harmless-error test would make no sense because jury-selection errors that result in a juror being seated against a litigant's will cannot be evaluated for outcome-determination.[35] Outcome-determination analysis asks whether an error affected a trial's outcome. When a trial judge errs by refusing to allow a particular juror to be excused, that would mean asking what could never be ascertained: whether the juror who would have replaced the one the defendant unsuccessfully sought to excuse would probably have changed the outcome of the deliberations.[36] An outcome-determination standard of reversal for jury-selection errors would be completely unworkable. Its adoption would make a defendant's statutory right to peremptory challenges utterly unenforceable, and thus offend the basic premise of our justice system that "every right, when withheld, must have a remedy, and every injury its proper redress."[37]

Nor is the alternative proposed by the concurrence—a test that asks whether the jurors seated over objection were in some way biased or partial—any better. A juror who

---

[35] The prosecution asserts that it know of no precedent for *non*constitutional structural error. Prosecution's brief at 9. As argued above, though, a number of cases have identified a trial judge's erroneous denial of peremptory challenges as structural error without reaching the constitutional question. See cases cited in footnote 27 of this brief. Moreover, when courts (such as this Court in Miller) reviewing non-trial-errors reverse without applying a harmless-error test, they are impliedly ruling that the error is structural.

[36] See Annigoni, 96 F3d at 1145; Vreen, 143 Wash 2d at 239; 26 P2d at 931.

[37] Marbury v Madison, 5 US (1 Cranch) 137, 163; 2 L Ed 60 (1803).

is in some way biased or partial is subject to challenge for cause. MCL 768.10; MCR 6.412(D). Were this Court to impose a "biased juror" harmless-error test it would allow a remedy for arbitrary denials of the right to peremptory challenges only in those cases in which the litigant already had a separate, challenge-for-cause remedy. In other words, the harmless-error test advocated by the concurrence would give teeth to the peremptory-challenge right only in cases where the right was superfluous to the one to challenges for cause; in all other instances, the rule would effectively abolish the right by rendering it unenforceable. Judges such as the trial judge here would be free to whimsically deny a party its statutory right to peremptory challenges, confident in the knowledge that his error would not lead to reversal. Again, a right would be left without a remedy.

The "biased juror" test is unsatisfactory for another reason, too: it fails to consider the traditional use of peremptory challenges as a tool for weeding out juror bias or partiality that cannot be demonstrated in the record. As noted above, this function of the peremptory challenge is so ingrained in our jury-trial tradition that "[o]ne could plausibly argue (though we have said the contrary . . .) that the requirement of an 'impartial jury' impliedly *compels* peremptory challenges . . . ." Holland, 493 US at 481-82 (Scalia, J.) (citation omitted; emphasis in original). A standard requiring a litigant to prove actual juror bias or partiality is insufficient to protect that litigant's right to the use of a device intended for the very purpose of protecting against bias or partiality that cannot be proven.

D. IF A HARMLESS-ERROR TEST IS APPROPRIATE AT ALL, IT IS APPROPRIATE ONLY IN THOSE CASES WHERE THE RIGHT TO PEREMPTORY CHALLENGES WAS DILUTED (OR "IMPAIRED"), NOT WHERE IT WAS DENIED OUTRIGHT.

As the Court of Appeals' lead opinion recognizes, denial-of-peremptory-challenge claims can be divided into two broad categories: those that involve only the dilution of the right (such as by modification of the jury-selection process in a way that limits the utility of the challenges or by forcing the litigant to use a peremptory challenge to strike a juror who should have been excused for cause), and those that involve actual denial of the right to remove a particular juror despite an available challenge. Because this case involves the latter, much more serious kind of claim, reversal is appropriate.

The concurrence supports its argument for a harmless-error rule with citations to three cases. However, all the three cases involved claims of dilution or impairment of the right to peremptory challenges; none of them addressed its outright denial.

The germ of the concurrence's argument is a dictum contained in a footnote in United States v Martinez-Salazar.[38] Martinez-Salazar contended that he was denied his right to a full complement of peremptory challenges when the trial judge erroneously denied his challenge for cause, thus "forcing" him to expend one of his peremptory challenges on the objectionable juror. The court disagreed, observing that Martinez-Salazar was not "forced" to use the challenge ("[a] hard choice is not the same as no choice"), and that in any event his use of the challenge was in keeping with one of the purposes of the peremptory challenge—to undo the harm of an erroneous for-cause

[38] 528 US 304, 317 n 4; 120 S Ct 774; 145 L Ed 2d 792 (2000).

ruling.[39] Because the court found no error, it had no occasion to consider the standard of reversal. In a footnote, however, it noted that the automatic-reversal rule for peremptory-challenge errors announced in Swain, supra, was "not only unnecessary to the decision in that case . . . but was founded on a series of our early cases decided long before the adoption of harmless-error review."[40]

It is easy to see why, then, the concurrence and the prosecution point to the Martinez-Salazar footnote as reason to doubt the continuing validity of an automatic-reversal rule for all peremptory-challenge errors.

The issue in this case, however, is critically different from the one presented in Martinez-Salazar. Martinez-Salazar was not forced to stand trial with a jury composed in part of persons he suspected of bias but was unable to exclude, even though he had the peremptory challenges to use against them. As the Washington Supreme Court recently noted in a case indistinguishable from this one, "the key distinguishing feature between Martinez-Salazar and the instant matter is Martinez-Salazar was not denied the use of any of his peremptory challenges, and the offending juror did not sit on the jury, whereas here Vreen was denied use of one of his peremptory strikes and juror number 55 sat on the panel that convicted him."[41]

Martinez-Salazar involved a claim of dilution (or "impairment") of the right to peremptory challenges. The court's hint that it might not automatically reverse in

---

[39] 528 US at 315, 316; see also 528 US at 319 (Scalia, J., concurring).

[40] 528 US at 317, n 4.

[41] Vreen, 143 Wash 2d at 928; 26 P2d at 238; see also Annigoni, 96 F3d at 1146-47, and Broussard, 987 F2d at 221, both pre-Martinez-Salazar cases that recognize the distinction between claims of outright denial from claims of impairment and refuse to apply harmless-error analysis to the former.

impairment cases is simply no predictor of its position in cases, such as this one, of outright denial.[42]

The second case cited by the concurrence, United States v Patterson,[43] is even more easily distinguishable. Patterson involved a trivial dilution error—one that did not prevent either party from challenging a particular juror but instead only kept the defendants from "maximum strategic use" of an allotment of peremptory challenges that was already double what the court rule required the judge to give them.[44] Moreover, the error affected the prosecution as well as the defense.[45] Given those circumstances, it is easy to understand why Patterson decided against automatic reversal.

The concurrence's reliance on broad language in Patterson[46] to suggest that ordinary harmless-error analysis should apply to all jury-selection errors is refuted by

---

[42] It should be noted that Martinez-Salazar never contended that he would have otherwise used the peremptory challenge that he was "forced" to expend. He did not ask for additional challenges, and indeed, he announced himself "satisfied" with the jury as finally composed. Martinez-Salazar, 508 US at 309. At least one Justice appeared to view the absence of such a claim as dispositive. Id. at 317-18 (Souter, J, concurring).

[43] 215 F3d 776 (CA 7, 2000).

[44] 215 F3d at 780.

[45] 215 F3d at 778-79. The Patterson defendants pointed to a second mistake, involving the number of extra challenges allowed for alternate jurors, but that error too was a technicality, because the jury-selection procedure used by the judge precluded the need for extra challenges (and again, the error affected the prosecution as well as the defense). Patterson, 215 F3d at 780.

[46] 215 F3d at 781. Patterson's broad language is based on a dictum in Martinez-Salazar that hints at the eventual demise of the automatic-reversal rule in at least some denial-of-peremptory-challenge contexts. See Martinez-Salazar, 528 US at 317 n 4. Martinez-Salazar, though, was a case involving a claimed "dilution" error. Where, as here, a lititigant was wrongly prevented from excusing a juror who therefore ended up on the jury, the en banc Washington Supreme Court considered the Martinez-Salazar dictum and nonetheless decided to reverse, citing the gravity of the error. Vreen, 143 Wash 2d at 928-29, 931-32; 26 P3d at 238, 239-40. Neither the concurrence nor the prosecution has pointed to a single case that relies on the Martinez-Salazar dictum as reason to require a showing of harm where the error leads to the objected-to juror sitting on the jury.

Patterson itself as well as the body of Seventh Circuit case law. Patterson itself allows for the possibility that an "exceptionally confused jury-selection process" (i.e., a more serious dilution error) might warrant automatic reversal.[47] Moreover, Patterson was later explicitly limited by the Seventh Circuit Court of Appeals to apply only to cases involving "insignificant," "technical" errors in the jury-selection process.[48] And finally, the Seventh Circuit has even more recently ruled that the particular error at issue here—denial of the right to use a peremptory challenge based on spurious Batson grounds—is a constitutional violation requiring reversal.[49] In short, Patterson would not support the result the concurrence favors in its own jurisdiction; it should not be read to support that result here.

Nor does the third case cited by the concurrence, Lyons v United States,[50] help to decide this one. Again, Lyons is a dilution case: Lyons was unable to make full use of his peremptory challenges because he was inadvertently prevented from learning certain information that would have been useful to disclose possible juror bias. Lyons was not prevented from excluding any juror. The decision of his appeal has no bearing on this one.[51]

---

[47] 215 F3d at 782.

[48] United States v Harbin, 250 F3d 532, 548 (CA 7, 2001).

[49] Aki-Khaum, 339 F3d at 528.

[50] 683 A2d 1066, 1971 (DC 1996).

[51] Lyons is unhelpful for another reason, as well. The Lyons court was not presented with, and thus did not decide, the constitutional claims made here.

E. THE PROSECUTION'S CLAIM THAT THE RECORD SHOWS THAT TRIAL COUNSEL HAD RACE-CONSCIOUS REASONS FOR HIS ATTEMPTED STRIKES DOES NOT WITHSTAND SCRUTINY.

The prosecution is completely wrong in arguing that "[d]efense counsel was admittedly exercising his strikes on a race-conscious basis in order to achieve what he believed was a more racially balanced jury." Prosecution's brief at 12. Trial counsel made no such admission. Moreover, the record does *not* show that he was motivated by race and/or sex discrimination in making either disallowed strike, and it *does* show obvious and entirely acceptable reasons for at least one of the strikes.

The prosecution asks this Court to deduce from counsel's objections to Judge Townsend's rulings that counsel's motivations were improper. That argument ignores two critical points: (i) that the judge never asked counsel to explain his motives for striking the two jurors, and (ii) that counsel never offered an explanation for his motives. Instead, counsel focused his objection on step one of the three-step Batson procedure, which asks whether the challenging party has made out a prima facie case of discrimination.[52]

A pertinent factor in determining whether the challenging party has cleared this first hurdle is whether the striking party has excused all or most members of a protected class, or whether instead he has allowed some to remain. Many courts have concluded that if the striking party has allowed more than a token number of jurors of the protected class to remain on the jury, the challenging party has not made out its prima facie case. In Michigan, for example, the Court of Appeals has ruled that to make out a prima facie

[52] See Batson, 476 US at 96-97.

case of discrimination a party must usually show that the opponent has tried to remove *all* potential jurors of a particular race or gender from the jury. People v Williams, 174 Mich App 132, 135-37 (1989). In Williams, a case in which the defense claimed the prosecution used peremptory challenges to exclude black jurors, the court surveyed the cases from other jurisdictions and concluded that

> "[t]he only meaningful observation that can be made is that courts faced with a prosecutor who uses his peremptory challenges to obtain an all-white jury tend to infer discriminatory intent . . . , while those faced with prosecutors who allow some blacks to remain do not.
> * * * *
> That the prosecutor did not try to remove all blacks from the jury is strong evidence against a showing of discrimination." Id. at 136, 137.

In the time since Williams was decided, courts in other jurisdictions have continued to find no prima facie showing of discrimination—despite repeated use of peremptory challenges against jurors of a certain race or gender—where more than a token number of other members of that race or gender went unchallenged. See United States v Sangineto-Miranda, 859 F2d 1501 (CA 6, 1988) (fact that "the percentage of minority members on the ultimate jury is the same or greater" than on panel tends to "negate the inference of discrimination"); People v Garrett, 564 NE 2d 784 (Ill, 1990) (no prima facie showing where no evidence "that the level of black representation in the venire exceeded that in the jury"); see also, e.g., State v Braxton, 521 SE 2d 428 (NC, 2000) (no prima facie showing despite seven consecutive challenges against blacks where both jury and jury panel contained a majority of minority jurors); Commonwealth v Clark, 710 A2d 31 (Pa, 1998) (no prima facie showing re use of peremptories against blacks where blacks on jury ultimately chosen outnumbered whites); Valdez v People,

966 P2d 587 (Colo, 1998) (no prima facie showing even though prosecutor used most challenges against blacks where percentage of blacks on jury slightly greater than percentage on panel).[53]

Not surprisingly, then, counsel emphasized to the judge that, whatever the pattern of defense strikes, the racial makeup of both the jury panel and the resulting jury itself had remained about half-white. Counsel's point was that because the prosecution had never made out a prima facie case of discrimination, he did not have "to have a reason for exercising a peremptory challenge." 130a. His failure to go on to give those reasons, even when he (correctly) believed he should not be required to give them, should not be twisted, despite the prosecution's urging, into a tacit admission of improper intent.

Counsel would have course have been justified in striking Mr. Anderson because he was a friend of three high-ranking police officials and could not, without prompting, give absolute assurance that his friendships would not influence his deliberations. Despite the prosecution's claims to the contrary, the record simply does not support the

---

[53] In light of these cases the prosecution is simply mistaken in claiming that "[t]he statement by the trial judge that all the males challenged by the defense were white is an unrebutted fact finding, establishing a prima facie claim of discrimination." Prosecution's brief at 7, n 6. It should be noted, too, though, that the judge's "fact finding" is unreliable on its face. Though the judge claimed that counsel had expended "all" his challenges on "white males," the record shows (and the prosecution does not contest) that he in fact had excused two *women*.

inference that counsel would not have, if asked, supplied this obvious, race-neutral reason for his strike.

RELIEF SOUGHT

Defendant-Appellee asks this Honorable Court to uphold the ruling below.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: DWB

DOUGLAS W. BAKER (P49453)
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Date: November 10, 2004